

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Rules)
to Establish Part 27, the Wireless)
Communications Service ("WCS"))

GN Docket No. 96-228

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REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

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CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits its Reply Comments in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

The Commission's proposal to allocate the 2.3 GHz band through the auction process is an experiment that has failed in the past and shows little promise of avoiding a similar fate here. Auctions are efficient spectrum assignment mechanisms but

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

² Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, Notice of Proposed Rulemaking, FCC 96-441 (released November 12, 1996) ("Notice").

their use is inappropriate for spectrum allocation. The Communications Act charges the Commission with specific spectrum allocation responsibilities. The Commission may not ignore these responsibilities nor may it place them in the hands of private entities: it must ensure, not merely theorize, that the spectrum will be used in a manner that serves the public interest. To do so, the Commission must allocate the 2.3 GHz band to a specific initial use. In addition, the Commission must assign the spectrum so as to facilitate wireless competition and to encourage the efficient use of the spectrum, benefits offered by licensing the band in 10 MHz blocks for a geographic area no larger than an MTA.

Further, the effective fulfillment of statutory responsibilities and the need to maintain regulatory parity direct the Commission to consider the impact of WCS auctions on other wireless carriers. The Commission should extend the flexible use, disaggregation and partitioning proposals for WCS to cellular, PCS and SMR providers. Further, it should impose parallel build-out requirements on all wireless providers and should raise the spectrum cap to 55 MHz. Finally, to help mitigate the impact of WCS auctions on PCS licensees, the PCS auctions and licensing should be completed before the commencement of WCS auctions.

II. FAILURE TO ALLOCATE A USE FOR THE 2.3 GHz BAND THREATENS TO UNDERMINE THE FULFILLMENT OF THE COMMISSION'S STATUTORY OBLIGATIONS.

The Commission's proposal to allocate the 2.3 GHz band by permitting any use, subject to international footnotes, will slow

the development and deployment of new technologies, discourage efficient and intensive use of the spectrum and lower the bids for 2.3 GHz licenses at auction. The commenters almost unanimously cautioned the Commission against implementing the proposed "allocation by auction" method of determining the appropriate initial use for the spectrum. For example, Sprint indicates that the "open-ended nature of the WCS proposals . . . would discourage service innovation and efficient spectrum utilization."³ Alcatel warns that "[r]eliance upon market negotiations instead of on industry-developed, service-specific technical standards, would be disastrous. Chaos would result. . . . At a minimum, the Commission's proposal will paralyze manufacturers."⁴

Some commenters claim that the Commission's failure to allocate the band to a particular use is a violation of the Communications Act. For example, the Telecommunications Industry Association states that the open allocation proposal of the

³ Comments of Sprint Corporation at 2. Airtouch similarly warns that "[t]he uncertainties created by service flexibility also will drive down auction values, particularly since bidders are unlikely to know, in advance of the auctions, what services will be deployed in adjacent markets or on adjacent channels." Comments of Airtouch Communications, Inc. at 5.

⁴ Comments of Alcatel at 2, 4. Further, Motorola claims that "the Commission's 2.3 GHz proposal to allow license auction winners to provide any fixed, mobile, radiolocation, or satellite digital audio radio service throughout the band could unintentionally fracture the market, raise equipment costs to users, retard manufacturer investment, increase interference and threaten the investment of existing operators. Such results are simply not compatible with sound spectrum management." Comments of Motorola at 2.

Commission "exceeds the agency's statutory authority and fails to allocate radio spectrum in the public interest."⁵ Similarly, Lucent Technologies indicates that "[t]he Commission's proposal to allocate the 2.3 GHz band by auction endangers the fulfillment of its spectrum management responsibilities."⁶ Finally, BellSouth states that

Congress expected the Commission to make public interest determinations when it allocates spectrum, including consideration of consumer demand for particular services. If the Commission places no bounds on how a given spectrum allocation will be used, it cannot make this determination.

CTIA favors market-oriented policies and supports the use of auctions to assign spectrum to particular licensees. However, relying upon auctions to allocate spectrum for its appropriate use is contrary to the public interest.⁸ The fulfillment of the

⁵ Comments of Telecommunications Industry Association Fixed Point-To-Point Communications and Private Radio Sections ("TIA") at 1.

⁶ Comments of Lucent Technologies Inc. at 3.

⁷ Comments of BellSouth Corporation at Summary. Harris Corporation similarly warns that "the Commission should maintain its authority under Section 303 and not seek to delegate those legislated responsibilities to a third party, i.e., an auction winner. Stability in spectrum management and equipment standardization are essential to the public interest, convenience, and necessity." Comments of Harris Corporation - Farinon Division at 3.

⁸ In the General Wireless Communications Services ("GWCS") proceeding, the Commission responded to industry claims that it had failed to allocate spectrum in accordance with statutory requirements by stating that it had broad authority to allocate the spectrum to more than one permissible use and that nothing in Section 303 "limits the Commission's discretion in making spectrum allocations that it deems to serve the public interest." Allocation of Spectrum Below 5 GHz Transferred from Federal Government

public interest responsibilities that Congress placed upon the Commission through Section 309(j) is a necessary prerequisite to the success of a market-based spectrum management policy.

The Commission should not ignore the comments of the wireless industry. In the GWCS context, few parties supported the Commission's open allocation policy.⁹ Rather than heeding the cautionary warnings, the Commission engaged in a regulatory experiment which holds little promise of realizing the efficient and intensive use of the spectrum. The overwhelming opposition to the Commission's proposal in this docket to defer allocation responsibilities to private entities through auction should place the Commission on notice that pursuit of this course will, once again, fail to satisfy the Commission's statutory obligations.

Pre-auction spectrum allocation by the Commission will facilitate the auction process and will expedite the provision of service to the public. A number of commenters recommend using a

Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 634 at ¶ 20 (1995). However, while the Commission is granted considerable discretion in interpreting the provisions of the Communications Act, it does not have the authority to render those provisions meaningless. See MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S.Ct. 2223, 2231 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear") (citations omitted). The allocation requirement of Section 303 means nothing if initial allocation is so broad as to allow virtually unrestricted use of the spectrum.

⁹ See Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *First Report and Order and Second Notice of Proposed Rulemaking*, 10 FCC Rcd 4769, 4793 at ¶ 47 (1995) (noting that a majority of commenters opposed the Commission's broad allocation proposal).

portion of the 2.3 GHz band to offer nationwide wireless educational services for schools. For example, the Interactive Services Association suggests that WCS "has the potential to become a major source of access to advanced telecommunications services for the nation's classrooms and libraries."¹⁰ Vanderbilt University similarly supports the use of the 2.3 GHz band to provide a wireless infrastructure within schools for connection to the National Information Infrastructure.¹¹ The Rural Telecommunications Group urges the Commission to award a 10% bidding credit to applicants proposing discounted rates to schools.¹² CTIA encourages the Commission to consider the public interest benefits of setting aside portions of the 2.3 GHz band to provide schools and libraries with access to a wireless information network.

Similarly, CTIA notes the broad support among commenters for serving the needs of Public Safety agencies through the 2.3 GHz band. APCO indicates that "[t]here are some important public safety applications that could use [the 2.3 GHz] band . . . [such as] airborne and 'mobile' video operations in the field."¹³ AT&T Wireless recommends designation of one 10 MHz block to public safety uses.¹⁴ Motorola "does not believe the 2.3 GHz band holds

¹⁰ Comments of Interactive Services Association at 2.

¹¹ Comments of Vanderbilt University at 2.

¹² Comments of the Rural Telecommunications Group at 11.

¹³ Comments of the Association of Public-Safety Communications Officials - International, Inc. ("APCO") at 4.

¹⁴ Comments of AT&T Wireless Services, Inc. at 10.

significant promise to solve public safety mobile communications needs" but nevertheless advises the Commission to consider dedicating a portion of the band to public safety use.¹⁵ CTIA wishes to emphasize the importance of serving the critical needs of Public Safety agencies and encourages the Commission to consider methods of satisfying a portion of those needs in the 2.3 GHz band.

III. THE COMMISSION SHOULD LICENSE THE 2.3 GHz BAND IN 10 MHz BLOCKS FOR GEOGRAPHIC AREAS NO LARGER THAN AN MTA.

The Commission's proposal to issue nationwide WCS licenses was almost unanimously opposed by the commenters. For example, TDS attaches two analyses concluding that nationwide licenses increase the potential for noncompetitive or anticompetitive behavior and may retard technical innovation.¹⁶ AT&T Wireless Services claims that "the financial commitment associated with regional licenses or large spectrum blocks would discourage experimentation with new service applications."¹⁷ PacTel also concludes that a "nationwide service area would . . . result in less competition."¹⁸ CTIA agrees. The Commission should license the 2.3 GHz band in small geographic blocks, preferably BTAs and under no circumstances should the geographic area exceed the area of an MTA. As CTIA's comments, as well as the comments of other parties, explain in detail, the assignment of licenses in small

¹⁵ Comments of Motorola at 11 (emphasis added). SBC Communications and Sprint Corporation both similarly suggest dedicating a portion of the 2.3 GHz band to meet the needs of the public safety community. Comments of SBC Communications at 4 and Comments of Sprint Corporation at 11.

geographic blocks will: (1) promote the participation of designated entities in the auction process; (2) minimize construction costs for licensees; (3) promote competition in the provision of WCS by increasing the number of licensees; and (4) encourage the provision of service to rural areas.¹⁹

The commenters also supported the issuance of licenses in spectrum blocks of less than 30 MHz.²⁰ Assignment of WCS licenses in 10 MHz blocks provides licensees with sufficient spectrum to offer wireless broadband data services. Further, 10 MHz blocks are large enough to offer the flexibility needed for the subsequent introduction of a variety of service offerings.²¹

¹⁶ Comments of Telephone and Data Systems, Inc. ("TDS") at 2-3 (summarizing the conclusions of the attached analyses).

¹⁷ Comments of AT&T Wireless Services, Inc. at 3-4.

¹⁸ Comments of Pacific Telesis Group at 3.

¹⁹ For the same reasons, the Commission should reject the nationwide data license proposal of The Markle Foundation. See Comments of The Markle Foundation at 3.

²⁰ See, e.g., Comments of AT&T Wireless Services, Inc. at 3-4 (advocating the assignment of 10 MHz spectrum blocks according to MTAs); see also Comments of GTE Service Corporation at 5 (supporting the assignment of 10 MHz licenses on a BTA basis). The parties reached different conclusions as to the preferred specific size of the block. See, e.g., Comments of BellSouth Corporation at 9 (urging the Commission to award licenses in two paired 6+6 MHz channel blocks and one paired 3+3 MHz channel block); see also Comments of Sprint Corporation at 3 (advocating the assignment of licenses in blocks no greater than 5 MHz).

²¹ Moreover, by raising the spectrum cap to 55 MHz, 10 MHz blocks permit more eligible bidders at no risk to concentration. See Attachment to the Comments of CTIA.

In the Notice, the Commission indicated that, due to the time constraints imposed upon it by Section 3001, it will not consider proposals seeking to auction more than 306 licenses.²² The Commission can meet Section 3001's deadlines and still consider proposals that offer the maximum public interest benefits (i.e., proposals for greater than 306 licenses) by using streamlined auction procedures. Section 3001 does not require the Commission to use traditional auction procedures. Further, Section 309(j)(3) directs the Commission "to design and test multiple alternative [competitive bidding] methodologies under appropriate circumstances."²³ The expedited time frame within which WCS licenses must be auctioned constitutes a circumstance for which the use of a streamlined competitive bidding methodology would be appropriate. The comments recommended a number of options to facilitate the Commission's consideration of the appropriate auction procedure.

IV. THE COMMISSION MUST ADHERE TO THE REQUIREMENT OF REGULATORY PARITY WHEN ESTABLISHING RULES FOR THE 2.3 GHz BAND.

Section 332 requires the Commission to avoid creating regulatory advantages or disadvantages for similar carriers. In light of this requirement, and in keeping with the Commission's emphasis on market-based spectrum management policies, the Commission should permit competition in the marketplace, not

²² Notice at ¶ 14, n.27 ("We therefore generally will not entertain proposals that would require the auctioning of more than 306 WCS licenses.").

²³ 47 U.S.C. § 309(j)(3).

differing regulatory frameworks, to determine the level of a service provider's success. Principles of regulatory parity demand that the Commission regulate services in the 2.3 GHz band in a manner similar to its regulation of other comparable wireless services.

Consistent with the regulatory parity requirement, the Commission should not only exclude WCS from the spectrum cap, it should also increase the spectrum cap for cellular, PCS and SMR providers. The spectrum cap, designed to avoid spectrum concentration in the hands of a few, is no longer necessary. In fact, retention of the spectrum cap would: (1) result in lower bids for 2.3 GHz licenses; (2) limit the variety of services that could be offered in the 2.3 GHz band; (3) limit the number of competitors in the band by restricting existing wireless carriers from eligibility; and (4) competitively disadvantage cellular, PCS and SMR providers. In light of changed wireless market conditions, and to avoid the negative consequences associated with retention of the current spectrum cap, the Commission should, at a minimum, raise the cap to 55 MHz to enable existing CMRS providers to participate in the 2.3 GHz auctions and to offer service in that band.

The Commission should also establish construction requirements for 2.3 GHz licensees similar to those required of other CMRS providers. The Commission has proposed to refrain from placing build-out requirements on WCS licensees, yet it has offered no explanation for its policy that would not have been applicable to any other wireless service. If the Commission

deemed build-out requirements appropriate for PCS, the requirements would seem to be equally appropriate for WCS.

Further, the imposition of build-out requirements on cellular, PCS and SMR licensees involve significant expenditures for the licensees. An absence of construction requirements for WCS licensees bestows upon them a significant comparative advantage through the regulatory process. The corresponding disadvantage to PCS providers is at license renewal: while PCS licensees must build out their systems to retain their licenses, WCS licensees will have, in effect, perpetual licenses, permitting them to leave sparsely populated areas unserved and undermining the competitive positions of PCS providers on the basis of disparate regulatory treatment. The Commission must treat like services in a like manner and establish construction requirements for WCS licensees similar to those required of other CMRS providers.

CTIA agrees with the Commission's conclusion that disaggregation and partitioning promote more efficient and intensive use of the spectrum.²⁴ To avoid regulatory preferences, the Commission should extend the freedom to disaggregate spectrum and geographically partition licenses to all CMRS providers.

²⁴ See Notice at ¶ 27 ("[W]e propose to permit the WCS licensee or licensees to partition their service areas and to disaggregate their spectrum. We believe that such an approach would serve to promote the efficient use of the spectrum.").

However, the Commission has placed too great a reliance upon disaggregation and partitioning to serve the needs of designated entities.²⁵ CTIA joins many commenters in cautioning the Commission against relying upon disaggregation and partitioning to serve the spectrum needs of designated entities.²⁶ As CTIA explained in its comments, trends towards aggregation are more likely to occur than are trends towards disaggregation.²⁷ Reliance upon disaggregation as the sole method for designated entity involvement in the provision of WCS will fall short of the intended goal. Therefore, while policies allowing disaggregation and partitioning benefit smaller entities, they must be offered in concert with, not in lieu of, smaller geographic license areas to offer meaningful assistance.

²⁵ See Notice at ¶ 27 (asserting that permitting licensees to partition their service areas and to disaggregate their spectrum would "provide a means to overcome entry barriers through the creation of smaller licenses that require less capital, thereby facilitating greater participation by smaller entities such as small businesses, rural telephone companies and businesses owned by minorities and women") (citation omitted).

²⁶ See Comments of Rural Telecommunications Group at 5 ("[G]eographic partitioning and spectrum disaggregation are poor substitutes for smaller license areas. . . . An over reliance on partitioning also represents an unacceptable abdication of Commission responsibility."); see also Comments of Cook Inlet Region, Inc. at 8 ("Although the Commission's partitioning and disaggregation policies are important tools to permit flexible wireless service offerings, partitioning and disaggregation are not substitutes for mainstream participation by small businesses. The Commission will not satisfy its Section 309(j) obligations by relying on private market license splintering.").

²⁷ See Comments of CTIA at 13-14.

V. THE COMMISSION MUST COMPLETE PCS AUCTIONS FOR THE C THROUGH F BLOCKS BEFORE BEGINNING THE WCS AUCTIONS.

Many commenters noted the threat to the continued financial viability of PCS posed by the WCS auction. For example, Lucent stated that

permitting the 2.3 GHz band to be used for CMRS would aggravate the already significant financial burden which threatens rapid PCS build out by increasing the financial risk of PCS licensees.²⁸

Lucent further indicates that sources of financing for CMRS providers may perceive the supply of CMRS spectrum to be growing at a rate faster than the demand for CMRS. Hence, the willingness to invest in CMRS providers will diminish.²⁹ As PrimeCo notes, the detriment to PCS is magnified by the proposed preferential regulatory treatment for licensees of the 2.3 GHz band.³⁰ The Commission can minimize the damage by completing the PCS auctions before the commencement of WCS auctions. Failure to do so will undermine the Commission's

²⁸ Comments of Lucent Technologies Inc. at 7.

²⁹ Id. at 6-7. Further, the Florida Cellular RSA Limited Partnership indicated that the Commission's proposal "will undermine investments already made in PCS spectrum." Comments of Florida Cellular RSA Limited Partnership at 3. PCIA notes that "[i]f the Commission were to auction more spectrum for CMRS use at this time, then the present group of licensees and auction winners would find their spectrum devalued. This would make it even more difficult to raise the capital necessary to build out their systems and begin providing service to the public." Comments of PCIA at 6-7.

³⁰ Comments of PrimeCo Personal Communications, L.P. at 3 ("Creating regulatory disparity among services at this late date will adversely affect competition thereby delaying the provision of services, discouraging capital investment, and undermining the value of CMRS spectrum.").

efforts in both bands and will impede the fulfillment of its statutory duties.

Failure to complete the PCS auctions and licensing before commencing the WCS auctions will also impair the development of services in the 2.3 GHz band. Commenters cautioned that the rapid succession of CMRS spectrum auctions will lead to the perception that financial investment in new wireless services is easily and quickly diluted.³¹ The interest of financial markets in the development of the band will decrease as anticipated earnings stability dissipates. The overlapping spectrum auctions for similar services will increase the perception of an oversupply of spectrum and leave the bidders at auction with fewer investors and smaller investments. In short, the spectrum will not achieve its best and highest use. The result is not inevitable, though. The Commission can mitigate the damage by completing the licensing of PCS before WCS auctions begin.

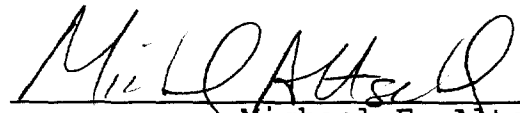
³¹ See Comments of Lucent Technologies Inc. at 7 ("[T]here is no immediate need for additional CMRS spectrum. . . . [N]ew WCS providers will find it difficult to secure financing for large expenditures for yet another CMRS offering."); see also Comments of Omnipoint Corporation at 3 ("The 'dumping' of spectrum on the market, which is the current market perception of the Commission's 2.3 GHz proposal, will benefit only the wealthiest few bidders.").

VI. CONCLUSION

CTIA urges the Commission to adopt the proposals contained herein to promote the efficient and intensive use of the 2.3 GHz band consistent with the Commission's statutory obligations and market-oriented principles.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**


Michael F. Altschul
Vice President, General Counsel

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Vice President for
Regulatory Policy and Law

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